

Proactive Policing and the Legacy of *Terry*

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INTRODUCTION

Fourth Amendment cases largely focus on a single aspect of policing: criminal investigation. *Terry v. Ohio* revealed a different side of policing, one in which officers patrol urban streets and intervene to solve problems as they emerge.¹ Though not complete, *Terry*'s representation of policing is far more like everyday patrol policing than the characterization in most criminal procedure cases. Yet, ironically, *Terry* made antiquated the very picture it drew. Contemporary policing often utilizes the tools *Terry* approved, investigative stops and frisks based on reasonable suspicion, not merely for the purpose of catching criminals, but more aggressively and programmatically. Stops and frisks are now part of proactive policing strategies aimed at preventing would be criminals from seeking to violate the law in the first place.

Proactive policing may make constitutional violations more likely because—when poorly implemented—it can encourage officers to engage in stops and frisks even when adequate suspicion is lacking or in a manner that discriminates. Indeed, some scholars have claimed that proactive policing using widespread stops and frisks is inevitably unconstitutional. More likely, proactive policing strategies can be designed to comply with constitutional law, at least under existing doctrine. Nevertheless, the widespread use of *Terry*'s permission slip can impose considerable harms on individuals and communities, and constitutional law does not adequately consider the trade-offs between the harms of proactive policing and its ability to deter crime. Thus, states and localities need to decide whether and how best to use the proactive policing strategies that *Terry* has generated. Though constitutional litigation is inevitably limited in its capacity to regulate proactive policing, it has a role to play as well. By generating data and raising the profile of proactive policing strategies, lawsuits can help facilitate the political process and jump-start state and local reform. In this paper, we consider *Terry*'s relationship to these three kinds of policing: investigative policing, the kind appearing most often in Supreme Court cases other than *Terry*, in which police officers act primarily as criminal investigators; patrol policing, the standard model of policing, which appears in *Terry* and predominates in most departments; and proactive policing, enabled by *Terry*, which includes a variety of contemporary preventative policing

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¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

efforts that supplement traditional crime fighting. The *Terry* Court recognized that constitutional law could not fully regulate policing on urban streets, even in its more traditional forms. Constitutional doctrine is even less useful for contending with the new world of policing that *Terry* has wrought. We argue that proactive policing that uses stops and frisks can probably be designed to comply with constitutional law. Thus, it must be regulated in the political arena, where cities and states can decide whether and when it is worth its costs. That political process necessitates that communities can engage in an accurate balancing of proactive policing's benefits and costs. Luckily, experience shows that both litigation efforts and statutory reforms can help facilitate that balancing.

I. INVESTIGATIVE POLICING AND *TERRY*

Local policing in the United States is dominated by patrol policing, also known as the “standard model,” in which departments devote most of their resources to responding to calls for service and random patrol. One would not know this from the Supreme Court's constitutional criminal procedure cases, which since the mid-20th Century have overwhelmingly portrayed police officers engaged in and motivated by the reactive project of investigating crime. *Terry* represents a rare exception.

In the Supreme Court's Fourth Amendment cases, police officers overwhelmingly catch criminals and uncover crime. To do so, they search homes and hotel rooms,² listen to phone conversations,³ traipse through fields and yards,⁴ paw through garbage,⁵ fly over back yards,⁶ walk dogs up to houses,⁷ search containers and cars,⁸ send undercover agents and informants,⁹ look in computers and cell phones,¹⁰ interview bus passengers and airport travelers,¹¹ stop and follow

² *Mapp v. Ohio*, 367 U.S. 643, 644 (1961); *Johnson v. United States*, 333 U.S. 10, 12 (1948).

³ *Katz v. United States*, 389 U.S. 347, 348 (1967).

⁴ *United States v. Dunn*, 480 U.S. 294, 297 (1987); *Oliver v. United States*, 466 U.S. 170, 173 (1984).

⁵ *California v. Greenwood*, 486 U.S. 35, 37–38 (1988).

⁶ *Florida v. Riley*, 488 U.S. 445, 448 (1989); *California v. Ciraolo*, 476 U.S. 207, 209 (1986).

⁷ *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013).

⁸ *Carroll v. United States*, 267 U.S. 132, 153 (1925); *Chambers v. Maroney*, 399 U.S. 42, 44 (1970); *California v. Acevedo*, 500 U.S. 565, 567 (1991); *Wyoming v. Houghton*, 526 U.S. 295, 298 (1999).

⁹ *Mincey v. Arizona*, 437 U.S. 385, 387 (1978); *Alabama v. White*, 496 U.S. 325, 326–27 (1990).

¹⁰ *Riley v. California*, 134 S. Ct. 2473, 2480–81 (2014); *United States v. Ganas*, 824 F.3d 199, 202 (2d Cir. 2016).

¹¹ *United States v. Mendenhall*, 446 U.S. 544, 547–48 (1980); *Florida v. Bostick*, 501 U.S. 429, 431–32 (1991); *United States v. Drayton*, 536 U.S. 194, 197–98 (2002).

people and cars (electronically or otherwise),¹² and arrest the suspects they find.¹³ Police address bombings, gambling, murder, check fraud, theft, driving while intoxicated, and—most persistently—illegal drugs.¹⁴

The Court's view of police as criminal investigators is not entirely surprising. It stems from the Court's experience with law enforcement. Before the Fourth Amendment applied to the states, that experience was almost exclusively federal. Federal law enforcement expanded dramatically in the first third of the 20th Century, and the Court found itself repeatedly responding to Fourth Amendment challenges to FBI and other federal law enforcement agents searching, seizing, investigating, and interrogating suspects to solve crimes like illegal drug-trafficking, bank robbery, kidnapping, and murder.¹⁵ On the rare occasion when non-federal police crossed the justices' desks, local and state officers were often involved in joint operations with federal law enforcement, or at least, in investigating crimes that also violated federal law. The law that developed reflected federal law enforcement's purposes and its professionalism.

In *Johnson v. United States*, for example, a Fourth Amendment case from 1948, the Court considered a joint investigation in a hotel by a Seattle narcotics officer and federal agents based on a tip from a confidential informant. The officers entered a hotel room without a warrant when they smelled burning opium and discovered drugs inside. The Court scolded the "zealous officers" for forgetting to get a warrant, noting that they failed to grasp the risk the Fourth Amendment protects against: probable cause should have been evaluated by a neutral magistrate rather than "judged by the officer engaged in the often competitive enterprise of ferreting out crime."¹⁶ Perhaps no language better summarizes the Court's view of law enforcement as professional crime fighters who risk excessive devotion to their task.

The year after it decided *Johnson*, the Court incorporated the Fourth Amendment through the Fourteenth Amendment in *Wolf v. Colorado*, and for the

¹² *United States v. Karo*, 468 U.S. 705, 709–10 (1984); *United States v. Knotts*, 460 U.S. 276, 278–79 (1983); *United States v. Jones*, 565 U.S. 400, 403 (2012); *Draper v. United States*, 358 U.S. 307, 309–10 (1959); *Spinelli v. United States*, 393 U.S. 410, 413–14 (1969); *Illinois v. Gates*, 462 U.S. 213, 226 (1983).

¹³ *United States v. Watson*, 423 U.S. 411, 413 (1976); *Payton v. New York*, 445 U.S. 573, 577 (1980).

¹⁴ See, e.g., *Weeks v. United States*, 232 U.S. 383, 386 (1914) (describing the unlawful search of a home by police in their attempts to gain a conviction); *Byars v. United States*, 273 U.S. 28, 29–31 (1927) (describing the search of a resident and seizure of stamps); *McNabb v. United States*, 318 U.S. 332, 333 (1943) (describing police work with informers to raid an illegal alcohol distribution ring); *Irvine v. California*, 347 U.S. 128, 129–131 (1954) (describing a police investigation and seizure of a "federal wagering tax stamp" in the breakup of a horse-race bookmaking scheme).

¹⁵ *A Brief History: World War, Cold War, 1939–1953*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/history/brief-history/world-war-cold-war> [<https://perma.cc/65MD-KAYP>] (last visited Sept. 2, 2017); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 163–64, 170 (2d ed. 1998).

¹⁶ *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

first time applied constitutional rules governing searches and seizures to local law enforcement officers engaged in exclusively local policing.¹⁷ Eleven years later, in *Mapp v. Ohio*, it extended the exclusionary rule as well, ensuring it would see many more local law enforcement cases.¹⁸ But even after *Wolf* and *Mapp*, the Court continued to view the police as “the knock at the door,” rather than the patrol officer on the street.¹⁹ In *Mapp*, and subsequently in the Fifth Amendment context in *Miranda v. Arizona*, the Court acknowledged some distance between the circumstances of local and federal law enforcement.²⁰ But in both cases, it did so only as a precursor to eliding any gap, arguing that federal and local law enforcement projects are not so different as to justify different rules.²¹ Incorporation doctrine, which applies the same constitutional rules to officers, whatever their employer, took the same view.²² Over time, differences between local and federal policing have faded from constitutional view.

Since *Johnson*, the Court has changed its view of many aspects of Fourth Amendment law. But it has maintained a consistent view about what police do and why they do it. In 2011, for example, in *Kentucky v. King*, it rejected the need for a warrant in circumstances remarkably similar to those in which *Johnson* required one. Specifically, the Court permitted officers to enter without a warrant an apartment from which the smell of burning marijuana emanated and into which a drug suspect might have fled.²³ Yet, despite the Court’s radically different view of the warrant requirement, *King*, like *Johnson*, is riddled with references to the investigative role of the police. By *King*, the Court was far less worried about the need for checking law enforcement activity; if anything it worried that lower courts were too aggressive in regulating the police. But its conception of the police project as dedicated to rooting out crime is the same, and it is not unique. *King* merely echoes *Johnson*; it does not quote it.²⁴ Dozens of other cases do, using the “competitive enterprise of ferreting out crime” language to describe both the risks and promise of investigative policing.²⁵

¹⁷ *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

¹⁸ *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

¹⁹ *See, e.g., id.* at 644 (discussing the illegal entrance of officers into the home of Ms. Mapp for the purposes of discovering “policy paraphernalia”).

²⁰ *See id.* at 651–53; *Miranda v. Arizona*, 384 U.S. 436, 483–86 (1966).

²¹ *Mapp*, 367 U.S. at 650–51; *Miranda*, 384 U.S. at 486.

²² *See Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (quoted in *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010)).

²³ *Kentucky v. King*, 563 U.S. 452, 456, 469 (2011).

²⁴ In fact, the Court in *King* makes a vague effort to distinguish *Johnson*. *Id.* at 469 n.5 (distinguishing the situation in *Johnson* because, unlike in *King*, the officers knocked and demanded entry before arresting Johnson and searching the room).

²⁵ Even in Fourth Amendment cases on use of force, the Court has portrayed the police as criminal investigators and has justified the use of force on those grounds. *See, e.g., Muehler v. Mena*, 544 U.S. 93, 98–99 (2005) (discussing officer actions in a drug investigation and holding that

This portrayal of the police as criminal investigators was and is misleading. Most law enforcement officers are local, and most local police resources are devoted to responding to calls and to random patrol, in accordance with the standard model.²⁶ In fact, more than two-thirds of local officers are assigned to patrol operations, which is more than four times as many as are assigned to investigations.²⁷ On patrol, the paradigmatic police officer engages in traffic stops, solves problems for community members, addresses incidents they stumble over, and answers calls, many of which involve no allegations of criminal activity.²⁸ In doing so, they exert a physical presence on the street, and thereby deter would-be criminals.²⁹ By contrast “criminal investigation plays a relatively small role in the day-to-day activities of police departments,” or, for that matter, in public safety, given that few crimes are solved as a result of the work of investigators.³⁰ Policing in the United States looks little like the Court’s view, in which police officers investigate reported crimes, surveil suspected criminals, and uncover conspiracies to engage in the kinds of crimes that are rarely reported.

By contrast, *Terry* captures important components of ordinary policing. In the incident that precipitated the opinion and is described in it, Martin McFadden, a police officer, intervened to prevent a violent crime—an armed robbery of a jewelry store—perhaps just before it started. Though McFadden was—ironically—a detective, the opinion describes his years on patrol, in which he would “walk and watch” the streets of downtown Cleveland for people who “didn’t look right” and swoop in to investigate.³¹ In the Court’s account, McFadden was engaged in anticipatory street policing, that is, patrol rather than

“[i]nherent in . . . authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention”).

²⁶ See AM. BAR FOUND., SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES, JULY 1959: HISTORY AND STATUS REPORT 13–14 (1959); WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 61–82 (Frank J. Remington ed., 1965); Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, 15 CRIME & JUST. 51, 51 (1992).

²⁷ BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 2 (2015) (“About 68% of local police officers were assigned to patrol operations, and about 16% worked in the investigations area.”).

²⁸ CHRISTINE EITH & MATTHEW DUNROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 3 (2011).

²⁹ Albert J. Reiss, Jr. & David J. Bordua, *Environment and Organization: A Perspective on the Police*, in THE POLICE: SIX SOCIOLOGICAL ESSAYS 25, 26 (David J. Bordua ed., 1967) (listing the many routine activities in which police are engaged); Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 702–04 (1967) (describing the paradigmatic features of police “peace keeping”); PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 95 (1967) (describing the process by which police presence deters crime); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013).

³⁰ NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 73–75 (2004).

³¹ *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

criminal investigation. He was able to respond to events so promptly that he caught the criminals even before they finished their ignoble undertaking, but no one could mistake his actions for the kind of police work at the center of cases like *Johnson*.

Even beyond the specifics of McFadden's actions, the Court made visible everyday patrol as a constitutionally relevant phenomenon. As the Court notes, "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime" such as a need to keep the peace or deter violence without resorting to actual coercion.³² It discussed the role police might take in "help[ing] an intoxicated person find his way home, with no intention of arresting him" or how they might "seek[] to mediate a domestic quarrel which threatens to erupt into violence."³³ Even recognizing the ways that officers might use their power to harass those "whose purpose for being abroad is not readily evident,"³⁴ is a way of acknowledging "the myriad daily situations in which policemen and citizens confront each other on the street."³⁵

One could argue that *Terry*'s description of policing is still flawed, or at least partial. Though much of the opinion seems to recognize the varied public order and safety goals of policing, in characterizing the government's interests at stake in carrying out frisks, for instance, the Court assumes that policing remains motivated by the goal of "crime prevention and detection" confined to "the legitimate investigative sphere."³⁶ Thus, McFadden worried because "he suspected the two men of 'casing a job, a stick-up.'"³⁷ And the Court sought to protect him in "the proper performance of the officer's investigatory duties."³⁸ The *Terry* Court even quotes *Johnson*'s description of the "competitive enterprise" of policing.³⁹ As a result of the Court's conflation of criminal investigation and patrol, it sounds in *Terry* as if "patrolmen walk around, respond to service demands, or intervene in situations, with the provisions of the penal code in mind, matching what they see with some title or another, and deciding whether any particular apparent infraction is serious enough to warrant being referred for further process."⁴⁰ But as Egon Bittner, the renowned sociologist, has pointed out, criminal law is more often the

³² *Id.* at 13.

³³ *Id.* at 13 n.9.

³⁴ *Id.* at 14 n.11 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967)).

³⁵ *Id.* at 12.

³⁶ *Id.* at 15, 22.

³⁷ *Id.* at 6.

³⁸ *Id.* at 8.

³⁹ *Id.* at 12 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

⁴⁰ Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *POLICING VOLUME I: COPS, CRIME AND CONTROL: ANALYSING THE POLICE FUNCTION* 155, 165 (Robert Reiner ed., 1996).

tool of than the object of street policing. Officers seek to impose temporary solutions on emergent situations that may need forcible resolution, and the power to arrest individuals for violations of criminal law is—for patrol officers at least—more often an effective means of stopping problems than an end in itself.⁴¹

In this way, *Terry* described what policing looks like better than it described its aims. Even so, *Terry* introduced a more accurate, more complex portrayal of the police than any earlier Fourth Amendment case. Since *Terry*, the Court has more often taken note of police on patrol, usually in the context of traffic stops where evidence was produced,⁴² and more occasionally in pedestrian encounters or 911 calls.⁴³ This should be no surprise: the rule in *Terry* ensured that, at least in many cases, such encounters would be subject to judicial scrutiny. The result is that, though policing as criminal investigation continues to dominate much of Fourth Amendment law, and *Terry*'s portrayal of patrol policing plays a smaller role in Supreme Court cases than it does in actual policing, after *Terry*, patrol policing is at least part of the Court's conception of law enforcement.

II. CONTEMPORARY PROACTIVE POLICING

Much of urban policing today looks very different not only from the investigative policing the Court describes in many Fourth Amendment cases, but also from both the patrol policing that *Terry* portrays and its Bittnerian cousin. McFadden's actions were preventative only in the limited sense that he stopped a crime that was about to happen, but they were fundamentally reactive in the sense that he waited for an indication of some problematic activity before he thought to intervene. One can think of McFadden's policing as an extreme form of rapid response: he addressed crime so quickly that he caught it even before it occurred. That was precisely what his department wanted him to do when they placed him on the streets of Cleveland. In the standard model of policing, officers are widely assigned to random preventative patrol to resolve disorder, catch criminals, and stop crime as it unfolds.⁴⁴

Traditional patrol still exists, but overwhelmingly departments now also engage in policing that is preventative in a deeper sense. Contemporary policing utilizes strategies designed to deter criminal behavior before it is contemplated. As

⁴¹ *Id.* at 156 ("Police are empowered and required to impose or, as the case may be, coerce a provisional solution upon emergent problems without having to brook or defer to opposition of any kind").

⁴² *See, e.g.,* *Whren v. United States*, 517 U.S. 806, 808 (1996) (involving plainclothes officers in an unmarked car following and ultimately pretextually stopping suspects); *Pennsylvania v. Mimms*, 434 U.S. 106, 107 (1977); *Maryland v. Wilson*, 519 U.S. 408, 410 (1997). *See also* *Berkemer v. McCarty*, 468 U.S. 420, 422–23 (1984) (considering whether a traffic stop constitutes custody under *Miranda*).

⁴³ *See, e.g.,* *Florida v. J.L.*, 529 U.S. 266, 268 (2000); *see also* *Illinois v. Wardlow*, 528 U.S. 119, 121 (2000).

⁴⁴ NAT'L RESEARCH COUNCIL, *supra* note 30, at 5.

early as the late 1960s, Albert J. Reiss, Jr. and David Bordua distinguished policing based on a request for service from police-initiated or “proactive” policing.⁴⁵ But proactive policing did not develop fully or spread widely in its contemporary form until the 1980s and 1990s,⁴⁶ after a series of reports in the 1970s and early 1980s raised serious doubts about the effectiveness of the traditional patrol model.⁴⁷ The newer forms of proactive strategies are premised on the idea that, if the desirable outcome of policing is public safety and order, officers should be out there *preventing* problems from emerging, not just stopping them when they do.⁴⁸

Contemporary proactive law enforcement, also sometimes called, “the new policing,”⁴⁹ is not a single police activity or departmental strategy. Instead, it includes a collection of innovative strategies, based on new criminological theories about how crime arises and how it can be stopped. Hot Spots policing focuses police attention on very small areas that suffer persistent and frequent crime.⁵⁰

⁴⁵ See Reiss & Bordua, *supra* note 29, at 29; David J. Bordua & Albert J. Reiss, Jr., *Command, Control, and Charisma: Reflections on Police Bureaucracy*, 72 AM. J. SOC. 68 (1966). See also ALBERT J. REISS, JR., THE POLICE AND THE PUBLIC 88 (1971) (“We have termed the police force . . . a proactive organization when it seeks criminal violations on its own initiative.”), which is frequently credited with developing the term.

⁴⁶ See NAT’L RESEARCH COUNCIL, *supra* note 30, at 24–25 (discussing the emergence of new methods of policing in the 1980s and 1990s). See also David Weisburd & Anthony A. Braga, *Introduction: Understanding Police Innovation*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 1, 9 (David Weisburg & Anthony A. Braga eds., 2006); David L. Weisburd & John E. Eck, *What Can Police Do to Reduce Crime, Disorder, and Fear?*, 593 AM. ACAD. POL. & SOC. SCI. 42, 42 (2004); Cynthia Lum et al., *The Evidence-Based Policing Matrix*, 7 J. EXPERIMENTAL CRIMINOLOGY 3, 5 (2011).

⁴⁷ See, e.g., GEORGE L. KELLING ET AL., THE KANSAS CITY PREVENTIVE PATROL EXPERIMENT: A SUMMARY REPORT 3 (1974) (finding that increase patrol did not affect levels of crimes, fear of crime, or citizen satisfaction); WILLIAM SPELMAN & DALE K. BROWN, NAT’L INST. OF JUSTICE, CALLING THE POLICE: CITIZEN REPORTING OF SERIOUS CRIME xix (1984) (indicating that rapid response was of limited use in addressing serious crime); JOHN E. ECK, POLICE EXEC. RESEARCH FORUM, SOLVING CRIMES: THE INVESTIGATION OF BURGLARY AND ROBBERY xiii (1983) (suggesting that criminal investigation has little impact on crime).

⁴⁸ See NAT’L RESEARCH COUNCIL, *supra* note 30, at 5. Other proactive strategies include focused deterrence policing and third-party policing. See Anthony A. Braga & David L. Weisburd, *Must We Settle for Less Rigorous Evaluations in Large Area-Based Crime Prevention Programs? Lessons from a Campbell Review of Focused Deterrence*, 10 J. EXPERIMENTAL CRIMINOLOGY 573 (2014) (discussing focused deterrence); Lorraine Mazerolle & Janet Ransley, *The Case for Third-Party Policing*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 191 (David Weisburd & Anthony A. Braga eds., 2006) (discussing third-party policing).

⁴⁹ See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); EUGENE McLAUGHLIN, THE NEW POLICING (2007); Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance and Race in the New Policing*, 43 FORDHAM URB. L.J. 621 (2016).

⁵⁰ See DAVID WEISBURD, IDEAS IN AMERICAN POLICING: PLACE-BASED POLICING 2 (2008), <https://www.policefoundation.org/wp-content/uploads/2015/06/Weisburd-2008-Place-Based-Policing.pdf> [<https://perma.cc/T9MJ-FT6X>]; POLICE EXEC. RESEARCH FORUM, VIOLENT CRIME IN AMERICA: WHAT WE KNOW ABOUT HOT SPOTS ENFORCEMENT 3 (Craig Fischer ed., 2008),

Predictive policing depends on collections of public and government data and analytical algorithms to identify individuals, groups, or locations that are likely to be involved in future crime.⁵¹ Stop, Question, and Frisk (SQF) seeks to deter street criminal activity, such as drug and gun possession or violence, by raising the expected cost of engaging in them.⁵² In Problem-Oriented Policing, departments address clusters of similar incidents using a structured technique for identifying and addressing quality of life problems with the community.⁵³ Broken Windows policing seeks to reduce urban disorder that might indicate an unmonitored neighborhood, in order to reduce crime.⁵⁴ And Zero Tolerance policing targets visible, minor street crime as a means to prevent more serious criminal activity.⁵⁵

As these brief descriptions suggest, proactive strategies are diverse in theory. They are also heterogeneous in the ways they are implemented. Across the United States, departments leverage new technologies, community partnerships, and the substantial legal authority available to the police in a range of ways to prevent crime, sometimes combining more than one proactive strategy. Despite this variety, however, very often proactive policing has in practice meant aggressively stopping and frisking individuals on the street in order to deter (rather than uncover or directly stymie) criminal activity. Departments often apply Hot Spots and Predictive Policing by concentrating enforcement in the form of stops and frisks in

http://www.policeforum.org/assets/docs/Critical_Issues_Series/violent%20crime%20in%20america%20-%20what%20we%20know%20about%20hot%20spots%20enforcement%202008.pdf [<https://perma.cc/XSA5-JWYJ>] (stating that hot spots policing is the most widely used anti-violence strategy).

⁵¹ See CRAIG D. UCHIDA, NAT'L INST. OF JUSTICE, A NATIONAL DISCUSSION ON PREDICTIVE POLICING: DEFINING OUR TERMS AND MAPPING SUCCESSFUL IMPLEMENTATION STRATEGIES 1 (2009); Beth Pearsall, *Predictive Policing: The Future of Law Enforcement?*, 266 NAT'L INST. JUST. J. 16 (2010).

⁵² See James Q. Wilson & Barbara Boland, *The Effect of the Police on Crime*, 12 LAW & SOC'Y REV. 367, 373 (1978) ("By stopping, questioning, and otherwise closely observing citizens, especially suspicious ones, the police are more likely to find fugitives, detect contraband (such as stolen property or concealed weapons), and apprehend persons fleeing from the scene of a crime.").

⁵³ See Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQUENCY 236 (1979); HERMAN GOLDSTEIN, PROBLEM-ORIENTED POLICING (1990).

⁵⁴ James Wilson and George Kelling first articulated the hypothesis that unaddressed disorder could lead to more serious criminal activity over time in their now-famous article titled "Broken Windows." George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982 at 4, <https://www.theatlantic.com/past/docs/politics/crime/windows.htm> [<https://perma.cc/6UQ9-AMRH>]. Broken Windows policing depends on the enforcement of "laws and ordinances against such minor offenses as littering, panhandling, prostitution, and other behaviors generally grouped under the terms 'incivilities' or 'public disorders.'" NAT'L RESEARCH COUNCIL, *supra* note 30, at 228–29.

⁵⁵ WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC (1998); John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime?: An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA 207, 224 (Alfred Blumstein & Joel Wallman eds., 2000) ("zero-tolerance policing attempts to impose order through strict enforcement").

the areas and against the people identified. They implement Stop, Question, and Frisk by heavily embracing its eponymous activities. When Problem-Oriented Policing identifies a problem, departments sometimes use intense enforcement in the form of stops and frisks as a method of addressing it. Broken Windows and Zero Tolerance Policing so often target stops and frisks on those involved in low-level crime and disorder that the strategies are conflated with Stop, Question, and Frisk.

In this way, proactive policing depends critically on the policing power permitted in *Terry*, and it does so in a manner unimaginable to the *Terry* Court. Once *Terry* put a constitutional Good Housekeeping Seal of approval on stops and frisks,⁵⁶ they became a legitimate tool in the police toolkit, one that could be used in a forward-looking way, and with any frequency, so long as officers complied with the constitutional rules. Thus, today, stops are carried out strategically to address long-term problems rather than immediate ones. One might reasonably call *Terry* the foundation on which proactive policing is built.

Of course, *Terry* is not alone in providing support for programmatic, proactive enforcement. Proactive strategies, especially Zero Tolerance and Broken Windows Policing, often depend on aggressive arrests for minor crimes as well as street stops.⁵⁷ Wide-ranging codes of misdemeanor offenses help make that possible.⁵⁸ So do some of the Court's more recent Fourth Amendment cases, most notably, *Whren v. United States*, which allows pretextual arrests, and *Atwater v. City of Lago Vista*, which allows arrests even for minor fine-only offenses; these are arguably almost as helpful to some proactive strategies as *Terry*.⁵⁹ But if *Terry* is not the only case that facilitates proactive policing, it remains the first and most important one. *Whren* was only decided in 1996, and *Atwater* in 2001, long after the major proactive policing strategies developed and began to be adopted. By contrast, *Terry* was the legal framework around which proactive strategies formed. Proactive policing is made possible by *Terry*, and *Terry* as a result remains central to the contemporary policing project, even as the project has departed from the kind of policing that the *Terry* decision described.

III. IS PROACTIVE POLICING CONSTITUTIONAL?

If proactive policing is an important part of *Terry*'s legacy, it is also a controversial one. In recent years, in city after city—New York, Philadelphia,

⁵⁶ *The History of the Good Housekeeping Seal*, GOOD HOUSEKEEPING (Oct. 1, 2011), <http://www.goodhousekeeping.com/institute/about-the-institute/a16509/good-housekeeping-seal-history/> [<https://perma.cc/CJV4-299L>].

⁵⁷ See NAT'L RESEARCH COUNCIL, *supra* note 30, at 228–29.

⁵⁸ Alexandra Natapoff, *A Stop is Just a Stop: Terry's Formalism*, 15 OHIO ST. J. CRIM. L. 113 (2017).

⁵⁹ See *Whren v. United States*, 517 U.S. 806 (1996) (allowing pretextual arrests); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (allowing arrests for fine-only crimes).

Baltimore, Chicago, and most recently, Milwaukee—private plaintiffs and the Department of Justice have alleged that the aggressive use of stops and frisks arising from proactive policing strategies violates constitutional law. Scholars agree, and they go further.⁶⁰ For example, Tracey Meares has argued that the shift from stops and frisks as the *Terry* Court envisioned them to their new use created a fundamental mismatch between, on one hand, *Terry*'s incident-specific analysis and the exclusionary rule context in which *Terry* claims are assessed, and on the other, the large scale, programmatic level at which the stops and frisks are directed and carried out.⁶¹ Similarly, Jeffrey Bellin argues that there is an inverse relationship between the effectiveness of a strategy of aggressive stops and frisks and its constitutionality on both Fourth Amendment and Fourteenth Amendment grounds, because deterring crime requires widespread and unconstitutionally arbitrary frisks within a narrow population.⁶² Both scholars suggest that effective proactive programs of stopping and frisking suspects are inevitably unconstitutional, at least under the best reading of constitutional law. We disagree. Although the proactive use of stops and frisks may make constitutional violations more likely, it seems feasible to design a proactive strategy that uses stops and frisks aggressively and still complies with constitutional law. However, just because a practice is constitutional does not make it a good idea.

Some proactive applications of stops and frisks likely lead to unconstitutional conduct. The federal district court opinion in *Floyd v. City of New York*, which declared New York City's use of Stop, Question, and Frisk unconstitutional, illustrates how poorly implemented proactive strategies can generate constitutional violations.⁶³ According to the district court's findings, the New York Police Department created incentives for officers to engage in frequent stops and frisks: they favored officers who produced lots of them, and they punished those that did not. Simultaneously, they did little to ensure that officers recorded each stop. Nor did they otherwise supervise the constitutionality of the stops.⁶⁴ Instead, they

⁶⁰ Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015); Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk"*, 94 B.U. L. REV. 1495 (2014).

⁶¹ Meares, *supra* note 60, at 159 ("A critical but obscured issue is the mismatch between the level of analysis at which the Supreme Court articulated the relevant test for constitutional justification of a stop-and-frisk in *Terry v. Ohio* and the scale at which police today (and historically) engage in stop-and-frisk as a practice.").

⁶² Bellin, *supra* note 60, at 1538 ("If a frisk can be avoided by avoiding criminal activity such as trespassing, public marijuana smoking or public urination, people can comfortably carry guns unlawfully so long as they obey (or think they will obey) other laws while doing so. Thus, a high volume of arbitrary frisks is essential to effectively deterring gun possession.").

⁶³ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562–63 (S.D.N.Y. 2013) (summarizing the finding of liability and the remedies imposed); Shira A. Scheindlin, *A Chance to Reflect: Thoughts from the Author of Floyd v. City of New York*, 15 OHIO ST. J. CRIM. L. 35 (2017).

⁶⁴ *Floyd*, 959 F. Supp. 2d at 561 ("Nor do supervisors ensure that an officer has made a proper record of a stop so that it can be reviewed for constitutionality.").

reinforced their commitment to quantity over quality with a disciplinary policy that resisted knowing whether an officer did wrong and rarely disciplined him when he did. Even if officers wanted to follow the law, their training was so inadequate that they were often disabled from doing so.⁶⁵ Police officers may be guided by factors other than material incentives as well, but it is hard to imagine that these kinds of departmental practices would not cause some officers to violate the Constitution.

Despite the problems with New York City's program, however, one can imagine a program of strategic, proactive stops and frisks that better complied with the Fourth Amendment. First, constitutional law provides a low bar for lawful stops and frisks. Reasonable suspicion that a person is involved in criminal activity is not a difficult standard for officers to meet to justify a stop. The suspect's behavior can be itself legal, and the officer's analysis need not be empirically valid for there to be reasonable suspicion.⁶⁶ Moreover, a vast misdemeanor code provides police a large menu of potential criminal activity of which citizens might be suspected. Thus, departments can probably ensure that every stop and frisk satisfies the constitutional standard and still conduct many of them. After all, even in *Floyd*, the available evidence indicated that the majority of stops made by the New York Police Department under the SQF program appeared to comply with the Fourth Amendment.⁶⁷

Second, proactive strategies often involve concentrating resources on hot spots in high crime areas. While the reasonable suspicion standard demands individualized suspicion, officers are permitted to include contextual facts, such as the crime rate in the area, in forming that suspicion. As a result, so long as police focus on high crime areas, they can effectively lower the behavior-based suspicious activity demanded for each stop.⁶⁸ Thus, when departments concentrate their efforts, officers are more likely to be able both to satisfy the law and to embrace a substantial program of stopping and frisking individuals on the street. In addition, such programs are especially likely to be effective: a growing literature suggests that the best crime control programs are those that strategically concentrate enforcement efforts in very small geographic areas.⁶⁹ Although Bellin

⁶⁵ *Id.* ("Deficiencies were also shown in the training of officers with respect to stop and frisk and in the disciplining of officers when they were found to have made a bad stop or frisk.").

⁶⁶ *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (noting "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis") (citing *Adams v. Williams*, 407 U.S. 143, 144, 147–48 (1972)).

⁶⁷ *See Floyd*, 959 F. Supp. 2d at 582–83. *See also* Report of Jeffrey Fagan at 55, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ 01034 (SAS)), (concluding that at least 68.9 percent of stops were legally justified).

⁶⁸ *See Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring) (stating that a frisk may be made automatically where a crime of violence is suspected and that for a non-violent crime an officer can develop reasonable suspicion based on something indicating weapon or non-compliance).

⁶⁹ *See, e.g.,* David Weisburd, Cody W. Telep & Brian A. Lawton, *Could Innovations in Policing Have Contributed to the New York City Crime Drop Even in a Period of Declining Police*

assumes that using stops and frisks to deter, at least as New York City did, requires applying stops and frisks on such a widespread and arbitrary basis that the department was unlikely to both deter and comply with *Terry*'s standard, by our reasoning, the converse is probably true: the same programs that are most likely to be legal—because they focus on high crime areas, for example—also may be the most likely to be effective.

This reasoning suggests that a department could adopt a proactive policing strategy in which officers stop and frisk suspects based on reasonable suspicion in order to deter crime, especially in a geographically-focused way, and survive constitutional review. Of course, ensuring that officers follow the law would require correcting the institutional problems that apparently caused the constitutional violations described in *Floyd*. Officers might be required to write contemporaneous reports recording the justification for any stop or frisk, and departments might need to check those reports for both adequacy and accuracy, as well as discipline officers who failed to comply with reporting requirements or the law. But that too seems entirely possible. And some of those institutional changes are much easier to imagine when one considers departments beyond New York's, which with nearly 35,000 officers—almost three times the size of the next biggest American police department—is simply *sui generis*.

In *Floyd*, plaintiffs argued and the Court found that the New York Police Department (NYPD) use of SQF violated the Equal Protection Clause as well as the Fourth Amendment.⁷⁰ Meares argues that the Fourth and Fourteenth Amendment violations are inevitably intertwined,⁷¹ and Bellin argues that racial profiling is essential to an effective SQF program because resource constraints would otherwise reduce the probability of being stopped below what is necessary to successfully deter carrying a firearms in public.⁷² Both overlooked the possibility of focusing deterrence by narrowing proactive policing geographically rather than demographically, something Hot Spots and Predictive Policing expressly endorse. The same focused strategies that are most likely to produce stops that satisfy the Fourth Amendment may also be the most likely to be able to be carried out effectively and without discrimination.

Strength?: The Case of Stop, Question and Frisk as a Hot Spots Policing Strategy, 31 JUST. Q. 129, 129 (2014) (suggesting that SQF targeted at specific hot spot areas allowed the NYPD to achieve deterrence with fewer stops and fewer officers).

⁷⁰ *Floyd*, 959 F. Supp. 2d at 540.

⁷¹ Meares, *supra* note 60, at 172 (“Scheindlin’s Fourth and Fourteenth Amendment liability findings are importantly intertwined, because racial disproportion in stops and frisks alone does not provide a foundation for a Fourteenth Amendment violation.”). See also Brando Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection’s Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131 (2012).

⁷² Bellin, *supra* note 60, at 1543 (“Given resource constraints, profiling based on gender, age and race seemed perfectly logical to the NYPD, and that is presumably why senior officers acknowledged the practice”).

Moreover, though critics of proactive policing often allege that proactive strategies discriminate, those arguments often seem to presume a more scrutinizing equal protection doctrine than presently exists. The *Floyd* court found that New York City's policy had disparate effects on blacks and Hispanics in part because it rejected using crime statistics as a benchmark measure of what stops and frisks would look like absent discrimination.⁷³ Yet it is unclear that other courts would reject the crime benchmark. It similarly found that the New York Police Department intentionally targeted blacks and Hispanics for stops and frisks based on statistical and limited direct evidence. But that ruling was never subject to appeal, and it is not clear that a less sympathetic court would have found a discriminatory purpose on the same facts.⁷⁴ Nor have the allegations in Philadelphia, Baltimore, Chicago, or Milwaukee that proactive policing leads to discrimination been tested in court. In discrimination lawsuits unrelated to proactive policing, statistics showing a disproportionate number of stops of minorities have rarely been treated as sufficient to make out a showing of discriminatory purpose on their own, and courts have been reluctant to infer discrimination without a stronger foundation than the New York case provided.⁷⁵ In fact, in one of the few Department of Justice's pattern or practice suits where an equal protection claim was contested, the court found that there was no express racial classification or discriminatory intent despite evidence of a number of racially charged statements. The court held that without context and absent a showing as strong as in *Floyd* "the Government's express classification evidence falls far short of that found sufficient in [*Floyd*]."⁷⁶ The court came to a similar conclusion with respect to discriminatory purpose.⁷⁷ In the Fourteenth

⁷³ *Floyd*, 959 F. Supp. 2d at 540.

⁷⁴ See *Chavez v. Ill. State Police*, 251 F.3d 612, 645–48 (7th Cir. 2001) (rejecting the use of data alone to demonstrate discriminatory intent and finding that policy documents telling officers to watch for Hispanics because of their disproportionate involvement in the drug trade were not enough to prove discriminatory intent guided the stops challenged in the case).

⁷⁵ See *United States v. Johnson*, 122 F. Supp. 3d 272, 351–52 (M.D.N.C. 2015) (distinguishing *Floyd* on the grounds that the showing of racially discriminatory intent was based only on comments by the county sheriff); *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that bad subjective intent is within the purview of the Equal Protection Clause, not the Fourth Amendment); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977) ("official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. . . . Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative"); *Chavez*, 251 F.3d at 637–45 (engaging in detailed analysis of statistical evidence of racial disparities in traffic stops and requiring that the evidence be able to point to similarly situated individuals or to appropriate benchmarks to demonstrate a discriminatory effect). But see *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (allowing an inference of discriminatory intent from statistics where an ordinance was enforced almost exclusively against a minority group).

⁷⁶ *Johnson*, 122 F. Supp. 3d at 351.

⁷⁷ *Id.* at 354–71.

Amendment context as well as the Fourth, one suspects that many proactive uses of *Terry*'s tools, even somewhat unfocused ones, could pass constitutional muster.

Scholars have argued that if the Fourth Amendment and Fourteenth Amendment doctrines do not prevent the proactive use of stops and frisks, the doctrines should change to accommodate these concerns.⁷⁸ But they could hardly be less likely to do so. To the contrary, the Court has been increasingly permissive about what constitutes reasonable suspicion in recent years, and it is almost unimaginable that it will become substantially more scrutinizing about Equal Protection violations anytime soon.⁷⁹

More importantly, even if the law evolved to restrict stops and frisks further, the doctrine's permissive nature is not epiphenomenal. It is the nature of constitutional rights, and especially Fourth Amendment rights, not to weigh individual interests fairly against those of the government. Rights are always framed as a ceiling on government action rather than an account of what police officers should do to ensure that law enforcement is worth the harms it imposes. Thus, even if Fourth Amendment reasonableness purports to engage in balancing of government and individual interests, in the end, it tells the police what they cannot do, not what they should.⁸⁰ In addition, those rights are likely to be more permissive to law enforcement than a fair weighing of the interests would reflect, both because they are set in advance by inexpert judges bent on preserving law enforcement flexibility and because they are designed to accommodate the needs of courts applying them as well as the police.⁸¹ Finally, since rights are held and enforced by individuals, usually with respect to specific actions, they do not do a good job of measuring—and can sometimes obscure—aggregate costs and benefits of policing, something communities care enormously about.⁸² Thus, it should come as no surprise that doctrines defining the scope of constitutional rights might permit stops and frisks that are socially very costly.

The Court often assumes that resource constraints are sufficient to check against police officers inappropriately capitalizing on permissive Fourth Amendment doctrines to tread upon individuals when the circumstances do not

⁷⁸ Other scholars, recognizing that proactive policing might well be constitutional under the Fourteenth Amendment have argued that we should squeeze challenges to proactive policing into other legal boxes. Aziz Huq, for example, proposes using Title VI of the 1964 Civil Rights Act to declare the proactive practice illegal on the ground that it imposes a disparate impact, though he acknowledges the law provides an "imprecise fit." Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop -and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397 (forthcoming 2017 draft ed.), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2845540 [<https://perma.cc/7JBR-AJ3R>].

⁷⁹ See *Navarette v. California*, 134 S. Ct. 1683 (2014) (holding that an anonymous tip from an eyewitness made through 911 is sufficient to support a finding of reasonable suspicion).

⁸⁰ Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 763 (2012).

⁸¹ Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 329–31 (2016); see also *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

⁸² See Harmon, *supra* note 80, at 777.

warrant an intrusion. Specifically, the Court imagines that when criminal conduct is minor or especially equivocal, an officer would usually have no interest in pursuing it, even when allowed by the Constitution to do so.⁸³ Thus, formulating constitutional law to protect against that problem is thought to be unnecessary. In proactive policing, however, pursuing equivocal conduct can have outsized deterrence benefits.⁸⁴ One could even argue, as Bellin does, that for proactive policing, inefficiency helps rather than hurts, because it generates greater deterrence.⁸⁵ Thus, not only is the Fourth Amendment likely to be permissive compared to a full weighing of privacy, autonomy, and bodily integrity interests at stake in stops and frisks, but one of the usual checks against the abuse of that freedom—limited resources—does not apply to proactive policing.⁸⁶ Given the Court's meager recognition of the realities of policing, *Terry* notwithstanding, it seems especially unlikely that the Court would recognize how flawed this assumption is with respect to proactive policing.

Constitutional law, and in particular the Fourth Amendment, is no better suited to evaluate proactive policing's benefits than it is to check its costs. Although the Court nominally balances the individual and government interests, it does not consider how well law enforcement strategies serve the government interest at issue. Thus, the Court does not consider whether an intrusive policing practice is effective or whether it is more effective than less intrusive alternatives, i.e., whether it is harm efficient, when deciding whether the practice is reasonable

⁸³ See *Atwater*, 532 U.S. at 352 ("it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason"); *Virginia v. Moore*, 553 U.S. 164, 174 (2008) (pointing out that cost-savings might lead to limits on police authority to seize individuals). Recently, some justices have noted that new technologies dramatically reduce the resources necessary for the government to intrude upon individual privacy. *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) ("because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'") (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)); *Id.* at 963 (Alito, J., concurring) ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken.").

⁸⁴ Bellin, *supra* note 60, at 1548 ("The NYPD's embrace of a citywide strategy of mass stop-and-frisk to deter gun possession and thus gun violence can, perhaps, be defended on public policy grounds.").

⁸⁵ Similarly, the failure to turn up a crime is not a persuasive argument against stops and frisks carried out under a proactive policing strategy, since stops and frisks can deter whether or not they effectively discover criminal activity.

⁸⁶ Of course, resource constraints might not check intentional harassment, a concern *Terry* mentions. See *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968). But since *Terry*, the Court has repeatedly stated that the Fourth Amendment does not address subjective motivation by the police, and has suggested in doing so, that there are not enough bad actors for this to be a major problem with Fourth Amendment protection. See, e.g., *Atwater*, 532 U.S. at 353 ("[T]he country is not confronting anything like an epidemic of unnecessary minor-offense arrests."); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

for purposes of the Fourth Amendment.⁸⁷ Though one could imagine the doctrine being otherwise, perhaps this is for the best: the Court is surely not in a strong position to assess controversial questions of criminology. Nevertheless, the consequence is that Fourth Amendment doctrine is devoid of the kind of analysis that might indicate whether a policing practice is reasonable in the important sense of being worth doing.

All this leaves us in the following position. The *Terry* Court accommodated law enforcement's need to respond to incident-specific events by legitimizing stops and frisks under a new standard, requiring less suspicion than probable cause. Since then, that tool has been turned into a diffuse weapon, like a form of tear gas, in proactive policing. It imposes largely temporary harms in order to deter and control. Neither the *Terry* opinion itself nor subsequent case law gives courts a way to easily check this use of *Terry*, which is no surprise in light of the structure and limits of the law. While some departments have likely violated the Constitution in implementing proactive stops and frisks, well-designed proactive policing programs that utilize stops and frisks probably could pass constitutional muster. *Terry* has therefore facilitated an important shift in policing in the United States, one that has the potential to promote public safety but also impose significant costs, and one which constitutional law is unlikely to regulate well.

IV. REGULATING PROACTIVE POLICING

If *Terry*'s reasonable suspicion framework is not well-designed to adequately balance the harms and benefits of proactive policing through stops and frisks, how will the practice be governed? As we usually govern the police: mostly through local political systems and state law.⁸⁸

Ordinarily, police chiefs and their top commanders determine policing strategy. But they do so subject to a range of formal and informal influences. Formally, chiefs can usually be easily fired, they operate within the constraints of state and local law, and they are limited to what is authorized in their department budgets. Less formally, chiefs and their command staff are subject to constant input from a raft of constituencies, including officers and their representatives; citizens and neighborhood groups; business leaders; city managers; mayors; and councilmembers.⁸⁹ The last two of these are in turn also subject to direct political review. This system creates a complicated mechanism for registering public concerns both about crime and about the costs of policing and ensuring that policing policy accords with it.⁹⁰

⁸⁷ See Harmon, *supra* note 80, at 763.

⁸⁸ See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 940–43, 954 (2015).

⁸⁹ See *id.* at 940–41.

⁹⁰ *Id.*

Local politics are an imperfect check on the harms of proactive policing, just as they are imperfect at checking policing's other costs. Majoritarian interests are more likely to focus on crime control than the costs policing imposes on individuals, which may get short shrift in the political calculus, at least when fear of crime is high. Relatedly, the costs of policing are often concentrated on those without a lot of political power, namely, those who live in low-income, high crime areas, and are suspected to be criminal. Thus, policing often is more intrusive, especially against some, than a fair weighing of the costs and benefits would warrant, and those harms are often unfairly distributed.⁹¹ But, even with these imperfections, the local political process ensures that community concerns influence law enforcement and it remains the primary way policing is governed.

Short of state or federal laws banning proactive policing—which are inconceivable—the local political process will govern proactive policing too. But as with traditional policing, good proactive policing decisions are hardly inevitable. Think about how hard those decisions are. A police chief must integrate all of the competing voices to develop a neighborhood-specific and historically-contextualized understanding of community concerns both about safety and order and about interactions with law enforcement. The latter must include how citizens experience the inconvenience, autonomy, privacy, bodily integrity, and dignity harms at stake, and whether enforcement may be (or may appear) unfairly distributed. All that is in addition to figuring out what effects different strategies may have.

Though constitutional law may not dictate proactive policing policy, civil rights lawyers nevertheless have a significant role to play in shaping the calculus that cities and police chiefs use in developing their policing practices. Constitutional litigation can obviously spark changes when plaintiffs are able to win on the merits. But it can also prompt change through settlements, especially those for injunctive or declaratory relief, even when—as in the case of challenges to proactive policing—the law seemingly provides limited leverage for plaintiffs. Moreover, in many contexts, high litigation and reputation costs may make a suit without a perfect claim on the merits worth settling. Many of the federal government's police reform suits under 42 U.S.C. § 14141 have benefited from exactly this dynamic. Thus, constitutional litigation may work to promote policing that is worth its harms, at least to some degree, even when the underlying constitutional doctrine does not.

Constitutional litigation is also surprisingly powerful at facilitating the political process. Specifically, lawsuits can be used to generate additional data about what the police are doing. For example, pre-*Floyd* litigation against the NYPD settled in a consent decree that committed the NYPD to collecting and making available the UF-250s—the forms on which police recorded *Terry* stops

⁹¹ *Id.*

and frisks.⁹² Those UF-250s became the basis for Jeffrey Fagan's expert report in *Floyd*, which declared SQF unconstitutional.⁹³ But equally important, because the settlement also made the data public, it allowed a much richer public debate about stops and frisks and their value. For example, the data made possible the *New York Times*'s interactive map, which allowed residents to see how many stops occurred on their block and to see the density of stops in the city overall.⁹⁴ As a result, both the justifications for the NYPD's stops and their distributional effects were far better understood.

In New York City, the litigation led to data, which in turn, led to public debate. In other localities, constitutional litigation has led to legislative action, including the passage of statutes mandating data collection and placing restrictions on police authority to engage in certain kinds of activities. In *Chavez v. Illinois State Police*, for example, the American Civil Liberties Union challenged a practice of traffic stops alleged to be in violation of the Fourth and Fourteenth Amendments. The litigation was ultimately unsuccessful, in part because the plaintiffs lacked the data needed to effectively demonstrate a disparate impact and discriminatory intent, or even to determine the basis for a number of traffic stops.⁹⁵ Though the litigation failed in the courts, it ultimately prompted the state legislature to recognize the coercive costs of traffic stops.⁹⁶ The Illinois State legislature passed laws mandating data collection on traffic stops and requiring police officers to record reasons for their stops.⁹⁷ Laws such as these help to facilitate future accountability by making practices more visible and the coercive costs of the activities more apparent to the voting public. A similar suit in

⁹² See *Historic Case: Daniels, et al., v. the City of New York*, CTR. FOR CONSTITUTIONAL RIGHTS, <https://ccrjustice.org/home/what-we-do/our-cases/daniels-et-al-v-city-new-york> [<https://perma.cc/ABL9-RF6F>] (last modified Oct. 1, 2012) ("The settlement agreement . . . requires that the NYPD audit officers who engage in stop-and-frisks, and their supervisors, to determine whether and to what extent the stop-and-frisks are based on reasonable suspicion and whether and to what extent the stop-and-frisks are being documented. The results of these audits were to be provided to CCR on a quarterly basis.").

⁹³ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013).

⁹⁴ See *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES (July 11, 2010), <http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html> [<https://perma.cc/9LE3-6K4V>].

⁹⁵ See *Chavez v. Ill. State Police*, 251 F.3d 612, 641–48 (7th Cir. 2001).

⁹⁶ See Bob Sexter, *Obama Sponsored Illinois Law to Keep Data on Race, Traffic Stops*, CHI. TRIB. (July 24, 2009), http://articles.chicagotribune.com/2009-07-24/news/0907230938_1_white-drivers-searched-motorists [<https://perma.cc/4D8X-NTPA>]; Will Guzzardi, *ACLU: Illinois State Police Show Racial Bias in Traffic Stops*, HUFFINGTON POST (June 7, 2011, 4:07 PM), http://www.huffingtonpost.com/2011/06/07/aclu-illinois-state-polic_n_872586.html [<https://perma.cc/8BCE-CYWY>] (citing the legal director of the ACLU Illinois stating "that there wasn't sufficient data to prove the [Chavez] case. . . . then-state senator Barack Obama and others pushed through the [law]").

⁹⁷ 625 ILL. COMP. STAT. 5/11-212 (2011) (requiring data collection on traffic stops).

Maryland led not only to a state law mandating data collection, but also to substantive prohibitions on the use of racial profiling by state police.⁹⁸

In addition, litigation—again, even when not entirely successful—can strengthen the salience of a policing practice, giving it a sufficient public profile to ensure scrutiny of the costs of that program and possible electoral consequences as a result. In this way, litigation facilitates political accountability and makes the costs of policing an important part of the local political process. This appears to have happened in New York City, at least to some degree. The plaintiffs won in *Floyd*, and the decision is influential, but that decision would not have been the last word in the expected litigation. Given the issues, it is not clear that either the liability decision or the remedy would have fared well on appeal. That question was never answered because political events overcame legal ones. In the presence of intense public and media debate following the *Floyd* decision, Bill de Blasio, a long-shot candidate, bet his political future on opposing the SQF policy, and won that bet.⁹⁹ After he took office, he withdrew the appeal, ending further litigation of the merits; agreed to the City's participation in the court-run remedial process; and has substantially changed NYPD's practices with respect to stops and frisks in New York City.¹⁰⁰ For proactive policing, as for other areas of policing policy, effective local governance depends on developing and making transparent sufficient information about policing to allow judgments about how well local officials are performing and then raising public attention to make those calls.¹⁰¹ At the end of the day, politics, not law, decided what was best for the City of New York. But law helped.

Effective governance also requires effective means of influencing public officials and police chiefs and controlling agency costs. Law can help here too, but usually in the form of statutes rather than litigation. Local governments can set up

⁹⁸ Press Release, ACLU, *ACLU, Civil Rights Groups and Maryland Officials Reach Landmark Racial Profiling Settlement*, (Apr. 2, 2003), <https://www.aclu.org/news/aclu-civil-rights-groups-and-maryland-officials-reach-landmark-racial-profiling-settlement?redirect=racial-justice/aclu-civil-rights-groups-and-maryland-officials-reach-landmark-racial-profiling-settlement> [https://perma.cc/Q3H6-6PDC]; Sheryl Gay Stolberg, *Maryland Restricts Racial Profiling in New Guidelines for Law Enforcement*, N.Y. TIMES (Aug. 25, 2015), https://www.nytimes.com/2015/08/26/us/maryland-restricts-racial-profiling-in-new-guidelines-for-law-enforcement.html?_r=0 [https://perma.cc/J98H-A3GL].

⁹⁹ See, e.g., Michael Barbaro, *The Ad Campaign: De Blasio Speaks Against Stop-and-Frisk Tactics*, N.Y. TIMES: CITY ROOM (Aug. 19, 2013), <http://cityroom.blogs.nytimes.com/2013/08/19/the-ad-campaign-de-blasio-speaks-against-stop-and-frisk/> [https://perma.cc/ZXY2-H2BB] (examining de Blasio's second campaign commercial, which dealt with his opposition to stop-and-frisk).

¹⁰⁰ Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014) https://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html?_r=0 [https://perma.cc/45D7-TXHX].

¹⁰¹ See Harmon, *supra* note 88, at 944; NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, No. 14, REPORT ON POLICE 1 (1931) ("The purpose of the investigation [is] . . . to present . . . in plain language, in official form, intelligible to every citizen wishing to be informed on the subject, the principal causes of the defects in police administration which too generally leave the citizen helpless in the hands of the criminal class.").

a range of political structures, some of which facilitate accountability far better than others. Though hiring and firing power over police chiefs and budgetary controls are the most common means of direct political influence over the police, they are not the only ones. For example, local governments can add on processes to check especially intrusive local policing. Consider a recent Seattle ordinance passed after controversy about police surveillance. The rule requires that all police department acquisitions of surveillance equipment be approved by a vote of the city council. In this way, Seattle subjected intrusive widespread police practices to further public debate and scrutiny.¹⁰² Of course, legislation and litigation can interact. As the *Floyd* litigation progressed, the New York City Council was prompted to pass legislation creating the office of the NYPD inspector general to assess the practices and policies of the department and creating a new private cause of action to address alleged abuses.¹⁰³

States have also found ways to regulate the coercive aspects of policing and align accountability mechanisms. For instance, many states bar local police departments from directly benefiting from funds generated through civil asset forfeiture. By doing so, the states remove local incentives for police to engage in more aggressive enforcement against crimes likely to lead to forfeiture and localities to maintain their control over the funding of local departments. The federal Equitable Sharing Program allows police departments to bypass those restrictions, at least in some circumstances.¹⁰⁴ But states are starting to resist that bypass too: California, Nebraska, and New Mexico have all recently restricted local police department use of the federal program.¹⁰⁵ In the context of police surveillance, states have passed regulations requiring additional scrutiny when

¹⁰² See *Drone Case Studies*, N.Y. ST. B. ASS'N J., 20, 20 (Sept. 2014); SEATTLE, WASH. ORDINANCE NUMBER 124142 (Mar. 20, 2013).

¹⁰³ J. David Goodman, *City Council Votes to Increase Oversight of New York Police*, N.Y. TIMES (June 27, 2013), [http://www.nytimes.com/2013/06/27/nyregion/new-york-city-council-votes-to-increase-oversight-of-police-dept.html?smid=tw-share&_r=1&\[https://perma.cc/4YH3-87RH\]](http://www.nytimes.com/2013/06/27/nyregion/new-york-city-council-votes-to-increase-oversight-of-police-dept.html?smid=tw-share&_r=1&[https://perma.cc/4YH3-87RH]).

¹⁰⁴ ASSET FORFEITURE & MONEY LAUNDERING SECTION, CRIM. DIVISION, U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 3 (2009); see Harmon, *supra* note 88, at 929.

¹⁰⁵ Nick Sibilla, Opinion, *California Governor Signs New Criminal Conviction Requirement For Civil Forfeiture*, FORBES (Sept. 29, 2016, 6:15 PM), <https://www.forbes.com/sites/instituteforjustice/2016/09/29/california-governor-signs-new-criminal-conviction-requirement-for-civil-forfeiture> [https://perma.cc/WW2T-QGAN]; Nick Sibilla, Opinion, *Nebraska Just Abolished Civil Forfeiture, Now Requires a Criminal Conviction to Take Property*, FORBES (Apr. 20, 2016, 10:44 AM), <https://www.forbes.com/sites/instituteforjustice/2016/04/20/nebraska-just-abolished-civil-forfeiture-now-requires-a-criminal-conviction-to-take-property/> [https://perma.cc/2X44-MESM]; Nick Sibilla, Opinion, *Civil Forfeiture Now Requires a Criminal Conviction in Montana and New Mexico*, FORBES (July 2, 2015, 8:45 AM), <https://www.forbes.com/sites/instituteforjustice/2015/07/02/civil-forfeiture-now-requires-a-criminal-conviction-in-montana-and-new-mexico> [https://perma.cc/S7DS-4NAY].

police seek to use surveillance technology.¹⁰⁶ States have placed legal limits on arrests as well, with state statutes requiring officers to issue citations rather than make arrests.¹⁰⁷ States might similarly consider whether proactive policing justifies any additional restrictions.

There is some precedent for regulating proactive policing, at least the proactive policing that uses stops and frisks, through statutes and local ordinances. Notably, there have been statutory limits on stops and frisks since early the early days of the practice, long before *Terry*. So-called “watchmen” were authorized to temporarily detain suspicious persons under statutory law in 17th Century England.¹⁰⁸ These statutes specified under what circumstances detention was allowed, for how long the person could be detained, and when they were required to be released. When stops and frisks emerged as a more frequently used tactic in the late 19th Century, courts in New York and California debated whether the practice was permitted under pre-existing statutory authority.¹⁰⁹ To resolve the question, a number of states passed statutes authorizing—and limiting—stops and frisks.¹¹⁰ Still, today, a number of states provide officers stop and frisk authority by statute. But most of those statutes were passed just before or just after *Terry*. If anything, *Terry* stymied rather than facilitated statutory development.¹¹¹ Although some states passed statutes around the time of *Terry*, and some statutes have added further regulations around racial profiling and the length of detention for stops,¹¹²

¹⁰⁶ Craig Roush, Comment, *Quis Custodiet Ipsos Custodes? Limits on Widespread Surveillance and Intelligence Gathering by Local Law Enforcement After 9/11*, 96 MARQ. L. REV. 315, 365–66 (2012).

¹⁰⁷ See INT’L ASS’N OF CHIEFS OF POLICE, CITATION IN LIEU OF ARREST: EXAMINING LAW ENFORCEMENT’S USE OF CITATION ACROSS THE UNITED STATES 10, 11 (2016) <http://www.prettrial.org/download/law-policy/Citation-in-Lieu-of-Arrest-IACP-LJAF-2016.pdf> [<https://perma.cc/GKS9-WJNJ>].

¹⁰⁸ 2 WILLIAM HAWKINS, A TREATISE OF PLEAS OF THE CROWN 128–29 (London, 8th ed. 1824).

¹⁰⁹ See *Gisske v. Sanders*, 98 P. 43 (Cal. Dist. Ct. App. 1908) (recognizing the power of police officers to temporarily detain people on grounds less than probable cause); *People v. Rivera*, 201 N.E.2d 32 (1964), cert. denied, 379 U.S. 978 (1965) (holding that police have the power to detain and question individuals for a limited period of time).

¹¹⁰ Harvey E. Henderson, Jr., Note, *Stop and Frisk in California*, 18 HASTINGS L.J. 623, 623 (1967) (“several states, feeling the need for a modern rule which allows this type of temporary detention, have passed statutes which were intended to grant a police officer just such a power.”).

¹¹¹ See, e.g., David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. FORUM 56, 63–64 (2006) (“[C]onstitutional law makes legislators reckless. . . . Constitutional law can let politicians off the hook; once the Court weighs in, legislators can move on to other questions.”); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155 (1893) (“No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows.”).

¹¹² See, e.g., ARK. R. CRIM PRO. R. 3.1 (2017) (placing an explicit time limit on the length of stops and limiting the crimes for which officers may make stops); MONT. CODE ANN. § 46-5-403 (2014) (placing limits on the duration of stops by officers in Montana); N.M. STAT. ANN. 1978, § 29-21-2 (2009) (barring officers in New Mexico from using profiling in making stops).

most have left stops and frisks to whatever constitutional constraints exist on local police departments. Given that the proactive use of stops and frisks raises new concerns, perhaps it is time for legislatures to revisit whether the constitutional limits remain the right ones.

CONCLUSION

Terry v. Ohio provides a critical window into an important fact about local law enforcement: The criminal investigation that appears in most Fourth Amendment cases has long been far less representative of American policing than the street patrol carried out by Officer McFadden. Yet *Terry* also made possible a form of policing that changes the very picture *Terry* described. With the Court's imprimatur, police departments have developed and adopted a wide range of proactive strategies that use stops and frisks proactively, strategically, and preventatively, in a manner unimagined by the Court. Constitutional law does not provide a meaningful way of evaluating the policing that is *Terry's* legacy. States and localities should therefore rethink leaving stops and frisks to the constitutional arena. Instead, regulating today's policing will require an approach that takes seriously the input and assessment of the communities being served.